IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 15 of 2003

in

SPECIAL CIVIL APPLICATIONNo 7190 of 2002

with

LETTERS PATENT APPEALS Nos. 16 of 2003 to 85 of 2003
with
LETTERS PATENT APPEAL NO. 314 OF 2003

WITH

LETTERS PATENT APPEALS NOS. 234/2003, 240/2003,
241/2003, 242/2003, 244/2003 & 246/2003

WITH

LETTERS PATENT APPEALS NOS.238/2003, 243/2003,
245/2003 & 247/2003

WITH

LETTERS PATENT APPEALS NOS.248/2003, 235/2003
& 303/2003

WITH

LETTERS PATENT APPEALS NOS.237/2003 & 239/2003

WITH

LETTERS PATENT APPEAL NO.236 OF 2003

WITH

LETTERS PATENT APPEAL NO.118 OF 2003

WITH

LETTERS PATENT APPEAL NO.225 OF 2003

WITH

CIVIL APPLICATION NO.213 OF 2003

WITH

CIVIL APPLICATIONS NOS.216/2003 TO 283 OF 2003,
285/2003, 291/2003, 1614/2003 TO 1628/2003,
566/2003, 1484/2003, 1866/2003
AND
CIVIL APPLICATION NO.2005/2003

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHRIJEE TRADING COMPANY

Versus

STATE OF GUJARAT

Appearance:
LETTERS PATENT APPEALS NOS. 15/2003 TO 85/2003
and 314/2003 :

MR.S.B.VAKIL, SR. ADVOCATE with MR.A.S.VAKIL
Advocate for the Appellants

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha
Devani, Assistant Government Pleader for the
Respondents

LETTERS PATENT APPEAL NO.118/2003 :

MR.B.I.MEHTA, Advocate for the appellant

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha Devani, Assistant Government Pleader for the Respondents

LETTERS PATENT APPEAL NO.225/2003 :

MR.J.S.YADAV, Advocate for the appellant

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha Devani, Assistant Government Pleader for the Respondents

LETTERS PATENT APPEALS NOS.234/2003, 240/2003, 241/2003, 242/2003, 244/2003 & 246/2003 :

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha Devani, Assistant Government Pleader for the Appellants

MR.J.S.YADAV, Advocate for Respondent No.5 in LETTERS PATENT APPEAL NO.234/2003

RULE SERVED on the Respondents in all Appeals

LETTERS PATENT APPEALS NOS.238/2003, 243/2003, 245/2003 & 247/2003 :

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha Devani, Assistant Government Pleader for the Appellants

MR.R.M.CHHAYA, Advocate for the Respondents in all the Appeals.

LETTERS PATENT APPEALS NOS.248/2003, 235/2003 & 303/2003 :

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha Devani, Assistant Government Pleader for the Appellants

MR.R.C.JANI, Advocate for the Respondents in all the Appeals.

LETTERS PATENT APPEALS NOS.237/2003 & 239/2003 :

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha Devani, Assistant Government Pleader for the Appellants

MR.M.K.VAKHARIA, Advocate for the Respondents

LETTERS PATENT APPEAL NO.236 OF 2003 :

MR.S.N.SHELAT, ADVOCATE GENERAL with Ms.Harsha Devani, Assistant Government Pleader for the Appellants

MR.J.S.YADAV, Advocate for the Respondents

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 01/08/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. All these appeals are directed against the judgement and order dated 4th December 2002 made by the learned Single Judge in a group of petitions in which the petitioners challenged the action of the State Government of deciding not to renew under Rule 5 of the Gujarat Essential Articles (Licensing, Control & Stock Declaration) Order, 1981 (hereinafter referred to as "the Licensing Order of 1981"), the licences of wholesale kerosene dealers, who were not the agents / dealers of the Oil Companies, from 1-8-2002, and seeking a direction on the respondents to renew the licences of the petitioners as wholesale dealers in kerosene for a period of five years from the date of their applications for renewal with consequential and incidental orders. The petitioners challenged the provisions of Amendment Order 2002 made on 31-7-2002, by which definition of "Public Distribution System Kerosene Wholesale Dealer" was added as per Clause 2(18A) in the Licensing Order, 1981, and also the circular dated 31-7-2002 deciding not to renew the licences of those who were not covered by the said definition and to take action to cancel the existing licences of such persons.

1.1 One group of appeals, being Letters Patent Appeals No.15 of 2003 & cognate appeals is filed by the original petitioners against the orders rejecting their

applications for renewal of licences, while the other group of appeals, being Letters Patent Appeal No. 234 of 2003 and cognate matters, are filed by the State Government against the order allowing the petitions, challenging the cancellation of existing licences. All the appeals arise from a common judgement, and have been argued together by the learned counsel appearing for the respective parties.

2. According to the appellants - original petitioners, though they had earlier succeeded in Letters Patent Appeal No.538 of 2001, in which a Division Bench of this Court had set aside the executive orders made for excluding the wholesale kerosene dealers who were not dealers appointed by the Government Oil Companies, the State Government has repeated the same action and again excluded the appellants from being considered for issuing licences to them as wholesale kerosene dealers, to which they were entitled under the provisions of the Licensing Order of 1981 and which were being given to them and renewed from time to time till the amendment was made in the Licensing Order of 1981 by inserting the said definition clause 2(18A) by the impugned Amendment Order, 2002. The respondents have now, on the basis of the amendment taken a decision to abolish the wholesale dealers from the business of Public Distribution System in kerosene, excepting only those persons who were the agents / dealers appointed by the Government Oil Companies. According to the appellants, the respondents have discriminated against the appellants though they fell in the same class to which the other wholesale dealers in kerosene appointed by the Government Oil Companies belonged. The respondents, by a separate definition of "Public Distribution System Kerosene Wholesale Dealer", have created two classes of wholesale dealers contrary to the provisions of the Licensing Order of 1981 and in violation of the provisions of Article 14 of the Constitution of India. According to the appellants, they were doing the business of selling kerosene since 15 to 35 years and their families depended on the said source of income. The respondents authorities, however, by orders dated 31.7.2002 had decided not to renew the licences and to cancel them if already issued, in contravention of the directions contained in the decision of this Court, by which the earlier similar circulars were set aside. It was also pleaded that the agents / dealers of the Government Oil Companies were like any other traders or businessmen and simply because they were appointed as the dealers / agents by such Oil Companies, there did not exist any intelligible differentia between them and the appellants

who were also wholesale dealers in the same business. Moreover, the Licensing Order of 1981 did not provide for any such disability. According to the petitioners, they had a fundamental right under Article 19(1)(g) of the Constitution to carry on the said business and the restrictions which were sought to be imposed by the respondents were not warranted by the provisions of Article 19(6) of the Constitution. It was also pleaded that if there were any instances of malpractice, adulteration or violation of any provisions of the Licensing Order, then action could be taken against the defaulting individuals, but the removal of the entire class of wholesale dealers in kerosene on the basis of presumptions against them was not warranted and was beyond the powers and jurisdiction of the respondent No.1. According to the appellants, they had already made applications for renewal before the expiry of their licences and therefore, were entitled to get their licences renewed in view of Clause-5 of the Order of 1981. It was pleaded that, before making the impugned Amendment Order, 2002, the respondents did not undertake any exercise for being satisfied for reaching an opinion that it was expedient and necessary in the interest of public to make such an order. It was also contended that the impugned Amendment Order was not applicable to the petitioners who had made their applications for renewal of licences earlier than 31-7-2002. Moreover, it was held by the order dated 10th July 2002 made by the learned Single Judge in an earlier petition (Special Civil Application No.3492 of 2002) that those petitioners were entitled to get renewal for five years and not for a lesser period. Similar treatment ought to be given even to the present petitioners, whose applications for renewal were pending on 31-7-2002.

3. In the affidavit-in-reply filed on behalf of the respondent No.1 dated 6th September 2002, it was contended that, on the basis of the facts and figures which were available with the Department, there was reason to believe that a large amount of stock of kerosene was directly being diverted into the black market and that the wholesale dealers of kerosene formed the basis of irregularities and hence, it was desirable to remove the basis itself. The wholesale dealers were an extra chain in the system of distribution of kerosene which was considered, by and large, responsible for the black marketing of kerosene. It was stated that the Amendment Order dated 31-7-2002 amending the Licensing Order of 1981 by adding the definition of "PDS Kerosene Wholesale Dealers" in clause 2(18A) was issued after obtaining the opinion of the Legislative & Parliamentary

Affairs Department and concurrence of the Government of India, and the said Order was not a mere executive instruction since it was issued in exercise of the powers under Section 3(1) of the Essential Commodities Act, 1955. The impugned notification dated 31-7-2002, at Annexure "A" to the affidavit-in-reply, was issued pursuant to the said Amendment Order, 2002, and instructions were given to the subordinate officers not to renew the licence of wholesale dealers who were not company agents and whose licences had expired on 31-7-2002. It was contended that the policy decision was taken in the interest of the public and to remove the difficulties which were faced in the public distribution system. In paragraph 9 of the said reply, it was stated that, by the impugned order, the company's agents have to operate in the public distribution system and directly supply the PDS kerosene to the retailers, who in turn, would supply to the consumers and thus, the government have adopted a `two tier' system doing away with the earlier `three tier' system. It is stated that the PDS Kerosene is meant for the downtrodden and weaker sections of the society and the government was spending a huge amount of subsidy for PDS kerosene for giving relief to the card-holders by supplying it at a cheaper rate and therefore, it was the duty of the government to see that the benefit of subsidy reaches the targeted people. It is further stated that, on the basis of experience, it was found that the extra tier (wholesale dealers, who were not company agents/dealers) was engaged in diversion of kerosene by converting blue kerosene into white kerosene for the purpose of black-marketing and adulteration. Therefore, the government took a policy decision for the smooth functioning of the distribution system through company agents and retailers. Such a policy decision was in the interest of public at large and was not violative of the fundamental rights guaranteed by Article 14 or 19(1)(g) of the Constitution of India. It was also contended that the petitioners were not entitled to any renewal of their licences in view of the said policy decision reflected by the Amendment Order, 2002, and the impugned Circular.

4. The petitioners denied the averments of the affidavit-in-reply contending in their rejoinder that the number of prevention of blackmarketing cases filed against the wholesale dealers dealing in PDS kerosene was substantially less in comparison to those appointed by Oil Companies dealing in kerosene. A list of cases of black marketing / adulteration filed against the agents of the Oil Companies and Wholesale Dealers was given in the rejoinder, and it was contended that, there was

indulgence and favouritism shown to the agents appointed by oil companies in violation of the fundamental right of the petitioners - guaranteed by Article 14 of the Constitution of India. It was contended that the impugned Amendment Order, 2002 appeared to have been made at the dictates and wishes of the representatives of the oil companies. It was further contended that the petitioners had fundamental right to carry on trade in kerosene and the restrictions on their rights to carry on trade as wholesalers was unconstitutional and against the decision taken by the Division Bench in the earlier Letters Patent Appeals. It was also contended that the system had not been changed and the government had retained `three tier' system even after the impugned Order, because, the wholesale licences possessed by the agents of the oil companies had been kept intact, while those who were not the agents or dealers of such oil companies, were sought to be done away with. It was contended that the impugned Orders were violative of Articles 14, 19 (1)(g) and 21 of the Constitution. In paragraph 8 of the rejoinder, the petitioners contended that, to have an agency of an oil company was not a matter of wish, desire or competence of the petitioners, because, the agency was designed by all the oil companies as per the marketing plan and it may not be possible for the petitioners to get the appointment as an agent at the places where they were doing business, because, prior to the appointment of an agent, certain eligibility was prescribed by the oil companies and such conditions were mandatory. It was pointed out that the learned Single Judge, by judgement and order in Special Civil Application No.3492 of 2002, had directed the respondents to strictly consider the applications for renewal of licences made by those petitioners, in accordance with clause 5 of the Licencing Order of 1981, and that judgement should be treated as judgement in rem and made applicable to all persons even though they may not have appeared in Special Civil Application No.3492 of 2002. In paragraph 10 of the rejoinder, it was contended that almost in all cases, the petitioners had made applications for renewal of licence in the year 2000-2001 and paid the renewal fees for a period of five years and their licences should be treated to have been renewed in view of the decision of the learned Single Judge in Special Civil Application No.3492 of 2002.

5. In the sur-rejoinder filed on behalf of the respondents, it is stated that, so far as distribution of kerosene was concerned, the Central Government has always been recognizing, in all, two entities, viz. (1) dealers appointed by oil companies, and (ii) retailers, and it

was in this connection that the Central Government was fixing up the amount of commissions for distribution of kerosene and no category of wholesale licence holder was taken into account. The category of wholesale licence holder was brought in picture by the State Government as a result whereof, the said wholesale licence holders were operating between the dealers appointed by the oil companies and the retailers on the other. It was however felt that the category of "wholesale licence holders" was quite unnecessary and unsatisfactory and was creating operational difficulties at many a time. Moreover, it was a root cause for various misuses, apart from the consequential delays in the supply of kerosene to the ultimate consumers. Under these circumstances, by virtue of the amendment made on 31st July 2002, the category of wholesale licence holder in kerosene has been done away with. In paragraph 6 of the surrejoinder, it is reiterated that, by doing away with the stage of wholesale licence holder, kerosene was now being distributed through two stages, namely, (1) from oil companies' dealers to retailers, and (2) from retailers to consumers and by the present set-up, supply of kerosene, which is an essential item to be made available to economically weaker sections of the society at fair price, is not in any way affected by the amendment in question and the supply has on the contrary become faster. It is submitted that the public interest is on the higher pedestal than the interest of an individual and therefore, the policy decision taken in the larger public interest would prevail. It is stated that the policy decision with regard to the restriction of extra channel from the existing public distribution system had been taken with a view to see that supply of kerosene was made faster and effective. The issuance of such Licencing Order being a legislative function exercised in the public interest could not be challenged on the ground of non-complaince of the principles of natural justice.

6. The learned Single Judge, after considering in detail the contentions raised by the rival parties, relevant provisions and the record, held that since the State took a decision to eliminate the system of distribution through wholesale dealers who were not authorized by the government oil companies with a view to see that the kerosene was supplied directly by the authorized dealers to the retailers, it could never be said that such a decision was not in the public interest. It was held that it was for the State to decide the manner in which the system of distribution should work and to ensure that the ultimate consumer gets better quality and maximum supply of essential items. A

decision to eliminate middlemen like the petitioners from the chain of supply could not be said to be a decision which is not in a larger public interest. Such a decision was not ultra vires the object of the Licencing Order of 1981 or against any provisions of the Essential Commodities Act, 1955. The learned Judge held that the State had made the law by way of subordinate legislation for a laudable purpose with a view to ensure that consumer gets better supply of commodities by eliminating the class of middlemen and this was not beyond the scope of Article 19(6) of the Constitution. It was further held that the company agents or authorized dealers were directly getting supply from the manufacturers which was not the case so far as the petitioners were concerned. Moreover, the nature of control while functioning as a dealer appointed by the oil companies and while functioning as a wholesaler, without being appointed by the oil companies, would be different, because, in the former case, the authorization was subject to the control of the Government of India as well as the oil companies, during the course of supply, while in the latter, no such authorization was required from the Government of India nor was there any direct control of the oil companies. The accountability was more in the case of company agents in comparison to the petitioners who were not company agents. It could, therefore, not be said that the petitioners were similarly situated as those wholesalers who were appointed by the company as agents. Thus, the learned Single Judge negatived the challenge against the Amendment order of 2002 on the ground that it violated Article 14 or 19(1)(g) of the Constitution. It was further held that the Amendment order was not retrospective in nature and that the subordinate legislation could be made with retrospective effect only if there was a specific delegation made for the purpose under the parent Act. There was no authority assigned by the Central Government to the State Government to make an Order under Section 3(1) of the Act or amendment in such Order with retrospective effect and therefore, the impugned Amendment Order was having prospective effect only from 31-7-2002 being the date when was published. It was therefore held that the instructions issued by the State Government under the impugned notification dated 31-7-2002 could not have the effect of altering the impugned Amendment order into an Order having retrospective effect, nor could any condition in the Licencing Order which was earlier issued have the effect of any vested right of a person for holding a valid licence by virtue of such condition. It was, therefore, held that the Amendment Order of 2002 touching the eligibility criteria for getting the licence as a

wholesaler, could not be made applicable to persons who were already holding the licences on the date of amendment, since there was no legislation made for retrospectively taking away any vested rights under the licence. It was therefore held that the instructions issued on 31-7-2002 on the basis of the Amendment Order could not have the effect of taking away the vested rights of the persons holding valid licence as wholesale dealers in kerosene. The notices issued by the State Government proposing action against persons holding valid licence on the date of the Amendment Order for cancelling them were, therefore, held to be without authority and bad in law. It was further held that so far as the applications which were pending for renewal of the licence on the date of the Amendment Order were concerned, the provisions of the Amendment Order, as they existed on the date of taking decision on such applications, would apply and in that sense, the Amendment Order had "retroactive effect". Mere pendency of applications did not create any vested right in favour of the applicants and such applications were to be considered and decided keeping in view the eligibility criteria reflecting from the new definition added by clause 2(18A) of the Licencing Order. The learned Single Judge, therefore, held that the amendment in the Licensing Order of 1981 was not retrospective, and was only prospective, and that the rights of the persons already holding valid licence, to continue as wholesale dealers in kerosene which existed on the date of amendment, were not taken away until the expiry of the date of validity of licences, and further that, those whose applications for grant or renewal of licence were pending on the date of the amendment were not entitled to such licence on account of the Amendment Order of 2002 unless they acquire the status of company agents or authorized dealers of the company, and also that the Amendment Order of 2002 did not violate Article 14 or 19(1)(g) of the Constitution, rejected the petitions in which the petitioners had claimed grant or renewal of licences on the basis of their applications pending on the date of the Amendment Order, and allowed the petitions in cases where the petitioners were holding valid licences on the date of the Amendment Order. The present two groups of appeals are directed against this decision, one by the petitioners whose applications for grant or renewal of licence were pending on the date of the Amendment Order and the other by the State Government against the order allowing the petitions of those who were holding valid wholesalers licences on the date of the coming into force of the Amendment Order.

7. The learned Senior Counsel, arguing the appeals for all the appellants, whose petitions have been rejected, contended that the object of the definition clause was merely to avoid frequent repetition of the meaning of the words which are defined in the provisions of the enactment, wherever they may have been used. The definition of "PDS Kerosene Wholesale Dealer" inserted by clause 2(18A) of the Licencing Order of 1981 would apply wherever that phrase occurs in the said Licencing Order. Such definition cannot by itself bring about an amendment in the definition of the word "dealer" or "wholesaler" or in Clauses 3, 4, 7, 8 or 9 of the Licencing Order of 1981. Since the phrase was not used in any of the provisions of the Licencing Order, other than in the definition clause 2(18A) which was inserted by the impugned Amendment Order, 2002, such amendment was abortive and it did not have the effect of adding anything in the Licencing Order of 1981 that could authorized refusal of licence to the wholesale dealers or cancellation of the existing licences. It was submitted that the Court cannot supply the lacuna in the enactment and will not fill in the gaps or omissions in it. Reliance was placed on the following decisions in support of this contention.

[a] The decision of the Supreme Court in Smt. Hira Devi v. District Board, reported in AIR 1952 SC 362, was cited for the proposition that it was certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act. In paragraph 14 of the judgement, the Court observed that it was unfortunate that when the Legislature came to amend the old Section 71 of the U.P. District Boards Act, 1922, it forgot to amend Section 90 in conformity with the amendment of Section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon the expression "orders of any authority whose sanction is necessary".

[b] The decision of the Supreme Court in P.K.Unni v. Nirmala Industries, reported in AIR 1990 SC 933, was cited to point out that it was held in paragraph 9 of the judgement that the reason why the legislature provided for different periods for the two matters which are the necessary steps - one following the other - to be taken for setting aside the sale of an immovable property sold in execution of a decree was not for the Court to question. The Court would not assume

that the legislature made a mistake in this respect or made an omission in accomplishing what it had set out to achieve.

[c] The decision of the Supreme Court in Union of India v. Deoki Nandan Aggarwal, reported in AIR 1992 SC 96, was cited for the proposition that it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature, the Court could not go to its aid to correct or make up the deficiency. The Courts shall decide what the law is and not what it should be. The Court, of course, adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. It was held that, to invoke judicial activism to set at naught legislative judgement is subversive of the constitutional harmony and comity of instrumentalities. (See paragraph 14 of the judgement).

[d] The decision of the Supreme Court in State of Kerala v. Mathai Verghese, reported in (1986)4 SCC 746 was relied upon for the proposition that the Court can merely interpret a provision so as to make explicit the intention of the legislature. It cannot rewrite, recast or redesign the provision since the power to legislate has not been conferred on the Court. The Supreme Court also held that the Court should make a purposeful interpretation so as to `effectuate' the intention of the legislature and not a purposeless one in order to `defeat' the intention of the legislators wholly or in part.

7.1 It was then contended that the Government has, in the impugned circular at Annexure "E", assumed consequences which did not follow from the impugned Amendment Order that licence cannot be issued to a person who is not appointed as a dealer by the government oil company. It was submitted that if this proposition was correct, then the impugned circular at Annexure "E" did not have the backing of the Licencing Order, 1981. It

was submitted that a mere circular cannot be effective and will not take away the rights under the Licencing Order. In support of this contention, the learned Senior Counsel relied upon the decision of the Division Bench in Letters Patent Appeal No.538 of 2001 and other cognate matters, decided on 1-8-2001, in which, it was held in paragraph 21 of the judgement that that the impugned directions of the circulars which were sought to be supported on clause 25 of the Licencing Order, could not have been issued contrary to the provisions of the Licencing Order to provide for only one class of wholesalers who were agents of the oil companies, with further direction that the licencing authority should gradually phase out by eliminating class of wholesale dealers directly appointed by the licencing authority and not renew their licences on expiry of the periods of their licences. In paragraph 22 of the judgement, it was held that the State has derived it powers under Section 3 of the Act by virtue of section 5 thereof, and as a delegated authority it was required to follow the same procedure for making an order, as was to be followed by the Central Government under Section 3 of the Act. In paragraph 26 of the judgement, it was concluded that that impugned circular was merely executive instructions de hors the Licencing Order, 1981, and it was not a law, nor was it a delegated or subordinate legislation which could be said to be covered under Article 19(6) of the Constitution. The Court, therefore, set aside the circulars by which the policy decision of the State Government not to renew the licences of kerosene wholesale dealers who were not the agents of the oil companies.

7.2 It was then contended that the impugned Amendment Order, 2002 was ultra vires the provisions of Section 3(1) of the Essential Commodities Act, because, unless it was found that, but for such an order, the community will be deprived of the supplies or services concerned, such an Order could not be issued. Reliance was placed on the decision of the Supreme Court in Rajendra Kumar Gupta v. State of U.P., reported in (1997)4 SCC 511, in support of this contention, in which the impugned requisition order was held to be ultra vires Section 23 of the Defence and Internal Security of India Act, 1971, unauthorized and incompetent on the ground that the object underlying the impugned requisition order had no nexus with the maintenance of supplies and services essential to the life of the community and was totally de hors the provisions of Section 23.

7.3 The learned Senior counsel further argued that

the impugned Amendment Order, 2002 and the impugned circular were violative of the appellants' fundamental rights to equality, because, they invidiously discriminated amongst wholesale dealers in kerosene who belong to the same class. The appellants, though not appointed as dealers by the government oil companies, were considered to be eligible for wholesaler's licence in kerosene between the years 1981 to 2002 and were doing their business as wholesale dealers in kerosene till the date of the Amendment Order. Now, there was brought about a classification between those who were recognized by the oil companies and those who were not and all those who were not appointed by the oil companies as dealers, were sought to be en mass made ineligible. Such a classification had no reasonable nexus with the object sought to be achieved by the said Act or the Licencing Order, 1981, of adequate supply of essential commodities. It was argued that the burden of showing that the differentiation between the two classes had reasonable nexus which is sought to be achieved was on the State, which has not been able to show what were the policy considerations that weighed with it in making the impugned Order. The State had put a sweeping restriction on one class and shown special favour to those who were dealers of the government oil companies to the exclusion of all other wholesalers though all dealers had a fundamental right to carry on business as wholesalers. No justification was shown for such classification and therefore, the impugned Order was violative of Article 14 of the Constitution. In support of this contention, the learned Senior Counsel, relied upon the following decisions :

[a] The decision of the Supreme Court in Union of India v. Cynamide India Ltd., reported in AIR 1987 SC 1802, was cited to point out that, in paragraph 4 of the judgement, it was held by the Supreme Court that the Court can examine the validity of the Price Control Order, if there is any hostile discrimination. In the same decision, the Supreme court held that the legislative activity being a subordinate or delegated legislative activity, it must necessarily comply with the statutory conditions, if any, no more and no less, and no implications of natural justice could be read into it unless it is a statutory condition.

[b] The decision of the Supreme Court in D.S.Nakara v. Union of India, reported in AIR 1983 SC 130, was cited for the proposition that the thrust of

Article 14 is that the citizen is entitled to equality before law and equal protection of laws. Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. (See paragraph 16 of the judgement).

[c] The decision of the Supreme Court in Kumari Shrilekha Vidyarthi v. State of U.P., reported in AIR 1991 SC 537, was cited to point out that, it was held by the Supreme Court in a case where there was no discernible principle for impugned action of changing all government counsel in districts throughout the State, even those whose tenure in office had not expired, it was held that such a drastic action could be justified only on the basis of some extraordinary ground equally applicable to all government counsel in the Districts throughout the State which is reasonable. The Court held that the reason, if any, for considering such en-bloc change necessary had not been disclosed either in the circular or at the hearing, and that it was difficult to appreciate the ground that the decision to terminate the professional engagement had been taken in order to streamline the conduct of the government cases and effective prosecution thereof was a reasonable basis for such drastic and sweeping action, particularly when the Manual provided ordinarily for renewal of the tenure of the appointees.

[d] The decision of the Supreme Court in Food Corporation of India v. Om Prakash Sharma, reported in (1998)7 SCC 676, was cited to point out that in a case where no material was produced by the Corporation to justify the amendments introducing classification between the graduates and non-graduates and where it was asserted that there was no difference in duties of graduates and non-graduates, it was held that amendments to the Regulations making a differentiation between graduates and non-graduates in the matter of promotion to the posts of AG I and AG II offended the equality clause and were, therefore, unconstitutional.

[e] The decision of the Supreme Court in Onkar Lal Bajaj v. Union of India, reported in (2003)2 SCC 673, was cited for the proposition that Article

14 guarantees to everyone equality before law. Unequals cannot be clubbed. Likewise, an arbitrary exercise of executive power deserves to be quashed. In the case before the Supreme Court, the only reason for the en masse cancellation of allotment was that a "controversy" had been raised and the solution resorted to, without there being an application of mind to any case, a controversy had been raised for cancellation of all allotments, which, as held by the Supreme Court in paragraph 45 of the judgement, was worse than the problem. It was held that equal treatment to uneuqals is nothing but inequality. To put both the categories - tainted and the rest - on par was wholly unjustified, arbitrary, unconstitutional being violative of Article 14 of the Constitution.

7.4 It was then contended that the impugned Amendment Order and the impugned circular were violative of the fundamental rights of the appellants guaranteed by Article 19(1)(g) of the Constitution. The impugned circular was not a law and cannot impose any restriction under clause (6) of Article 19 on the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India. The impugned Amendment Order, 2002 and the Circular in so far as they excluded all the wholesalers in kerosene, not appointed by the oil companies, from the field of distribution of kerosene through public distribution system imposed a disproportionate restriction on the fundamental right to do business and were liable to be set aside on the doctrine of proportionality as unreasonable restriction imposed on the fundamental rights of the appellants under Article 19(1)(g) of the Constitution of India. Reliance was placed on the following decisions in support of this contention :

[a] The decision of the Supreme Court in Bachan Singh v. State of Punjab, reported in AIR 1982 SC 1325, was cited to point out that it was held in paragraph 32 of the judgement that, when a law is challenged on the ground that it imposes restrictions on the freedom guaranteed by one or the other sub-clause of clause (1) of Article 19 and the restrictions are shown to exist by the petitioner, the burden of establishing that the restrictions fall within any of the permissive clauses (2) to (6), which may be applicable, must rest upon the State. The State would have to

produce material for satisfying the Court that the restrictions imposed by the impugned law fall within the appropriate permissive clause from out of clauses (2) to (6) of Article 19. The Supreme Court further held that there may be cases where the nature of legislation and the restrictions imposed by it may be such that the Court may, without more, even in the absence of any positive material produced by the State, conclude that the restrictions fall within the permissible category, as for example, where a law is enacted by a Legislature for giving effect to one of the Directive Principles of State policy and prima facie, the restrictions imposed by it did not appear to be arbitrary or excessive.

[b] The decision of the Supreme Court in Union of India v. G.Ganayutham, reported in (1997)7 SCC 463 was cited for the proposition that a statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the statute, and that the Court can go into the question whether there is a proper balancing of the fundamental right and the restriction imposed. In paragraph 28 of the judgement, it was observed that, "As and when an executive act or administrative action taken in excess of statutory powers, is alleged to offend fundamental freedoms, it will then be for the Supreme Court to decide whether the principle of proportionality applies in administrative law sphere in our country and whether the courts will take up a primary role. Whether the primary role will be confined to Articles 19, 21 etc. and not to Article 14 will also have to be decided".

[c] The decision of the Supreme Court in M.R.F. Ltd. v. Inspector Kerala Government, reported in (1998)8 SCC 227, was cited for the proposition that, in examining the reasonableness of a statutory provision, whether it is violative of the Fundamental Right guaranteed under Article 19, one has to keep in mind that the restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public, and that, there must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved.

[d] The decision of the Supreme Court in Om Kumar v.

> Union of India, reported in (2001)2 SCC 386 was cited to point out that the Indian Supreme Court had applied the principle of proportionality to legislative action since 1950. It was held that, by "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices, but, as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

7.5 It was also contended that the impugned Order adversely affected the vested rights of the appellants, who had applied for renewal before the expiry date of their licences i.e. before 31-12-2001, to get renewal under clause 5 of the Licencing Order, 1981, as its provisions existed before the amendment. This right was taken away by the impugned circular and the amendment, though the provisions of the Amendment Order, 2002 were not retrospective. The applications for renewal were already pending and the Amendment Order cannot apply to such pending proceedings. Right to renewal cannot be taken away unless a valid statutory amendment is made with a retrospective effect. Even if the amendment applied to fresh applications for licence, it cannot affect the vested right to the renewal of licence and the right to continue business as deemed licensee till the renewal was granted or refused. It was submitted that the right was being claimed as a licence holder under clause 5 for getting the renewal, and not as a dealer. It was further argued that the law affecting vested rights cannot be absolute and a delegated legislation cannot apply retrospectively as per the settled legal position. When any enactment affects vested rights, it would be retrospective and not retroactive. It was submitted that, in capacity as licence holders, the appellants had vested right under the scheme of the

Licencing Order to get renewal or to be considered for renewal in accordance with law, as it stood prior to the amendment. The learned senior counsel referred to the decision of the Supreme Court, State of Gujarat v. Hon'ble High Court of Gujarat, reported in (1998)7 SCC 392 in this regard, and pointed out that, in paragraph 47 of the judgement, the Supreme Court approvingly referred to a passage from Oxford Hand book of Criminology on "Retroactive and Retrospective Theories".

7.6 The other counsel, who appeared in these appeals for the parties who were original petitioners, have adopted the contentions which have been canvassed by the learned Senior Counsel for the original petitioners in these appeals.

8. The learned Advocate General appearing for the respondents, supporting the decision of the learned Single Judge in the petitions which have been rejected and opposing it in the petitions which have been allowed, contended that the provisions of the Essential Commodities Act, 1955 were placed at item 126 in the Ninth Schedule read with Article 31B of the Constitution of India and this fact should be kept in mind while dealing with any of the Orders made under the said Act, though he fairly submitted that such Order, will not attract the immunity given to the parent Act by virtue of its being placed in the Ninth Schedule. It was submitted that the said Act was enacted to provide, in the interest of general public, for the control of the production, supply and distribution of and trade and commerce in certain commodities and the Act and the Orders made thereunder were law giving effect to the directive principles to State policy contained in Articles 38 and 39(b) of Part IV of the Constitution and therefore, protected even by Article 31C of the Constitution. It was argued that, under Section 5 of the said Act, the Central Government was empowered to delegate its powers to the State Government and by virtue of section 6, the Orders made under Section 3 had an overriding effect over other enactments. It was then submitted that the public distribution system in kerosene was different from the parallel marketing system and these were recognized as different systems under the provisions of the Kerosene Restriction on Use and Fixation of Ceiling Price Order, 1993, and that the Central Government had also issued the Public Distribution System (Control) Order, 2001, as per which, the supply of essential commodities including kerosene was to be made as per the said system to ensure that the essential commodities are supplied to the ration card holders who are poor persons targeted to be benefitted by the public distribution system. It was

submitted that the general delegation of powers was made by the Central Government in favour of the State Government by its resolution dated 30-11-1974 issued under Section 5 of the said act and therefore, the State Government possessed all the powers that could have been exercised by the Central Government under the Licencing Order of 1981. It was argued that, after the amendment made in the Licencing Order, 1981, by Amendment Order dated 22-2-1994, licence was required only for PDS kerosene since, as per Schedule I Part II of the Licencing Order, 1981, after the said amendment, in Item 2(a) "Kerosene other than the kerosene sold under parallel marketing system as defined in the Order of the Government of India, Ministry of Petroleum and Natural Gas No. GSR/584(E) dated 2nd September 1993" was the essential article within the meaning of clause 2(8) for which an application for licence was required to be made in context of Clauses 3, 4 and 5 of the Licencing Order. It was submitted that, in view of the amendment in Part II of Schedule I, naming PDS kerosene as an essential article and the addition of definition by clause 2(18A), defining `PDS kerosene wholesale dealer' as a person who is appointed by a government oil company as a dealer, and, the requirement in the application Form "A" to mention the particulars including the category for which the licence is required, it was clear that no other amendment was required to be made in the Licencing Order, because, as per all these provisions, while applying for a licence as a wholesale dealer in respect of PDS kerosene, the definition clause defining `PDS kerosene wholesale dealer' would automatically apply for determining the eligibility of such applicant. If a person wanted wholesalers licence in PDS kerosene, he had to apply in Form "A" and while considering the application, the licencing authority would consider the definition of "PDS kerosene wholesale dealer" in clause 2(18A) which was devised for such a situation. The said definition being a special provision had the effect of prevailing over general definition of wholesale dealer, and those who dealt with kerosene sold under parallel marketing system, as defined in the Order dated 2-9-1993 and were not appointed by the oil companies were excluded from the definition. It was contended that the said Order of 2-9-1993 necessitated the amendment of the Licencing Order of 1981 to bring it in tune with the said Central Order. It was argued that there was no inconsistency between clause 3 of the Licencing Order and the definition under Clause 2(18A), and that the said definition was neither a surplusage nor was it redundant.

8.1 The learned Advocate General further argued that,

in order to achieve speedy distribution of PDS kerosene, which was coloured "blue" and meant for distribution through PDS to the licenced fair price shops, the middlemen wholesale dealers who were required to buy it from the dealers appointed by the company were removed in public interest. Moreover, there were complaints against such wholesalers and the supply meant for the ration card holders was being diverted as a result of this intervening chain of wholesalers. It was submitted that it was for the government to decide what mode of distribution should be adopted and what channels should be prescribed in a public distribution system of essential commodities and as per the policy decision, it has been decided to exclude the wholesale dealers who are not appointed by the government oil companies from the public distribution system of kerosene which was meant to be supplied to the poor. It was also argued that the gazetted circular dated 31st July 2002 should be treated as a part of the exercise of delegated powers by the State Government under Section 3(1) of the Act and should be held to be having a statutory force.

8.3 The learned Advocate General contended that the Court should give full effect to all the words in the enactment and nothing should be read as redundant. For this proposition, he relied upon the following decisions:

[a] The decision of the Supreme Court in Aswini Kumar Ghose v. Arbinda Bose, reported in AIR 1952 SC 369, was cited for the proposition that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. (see paragraph 26 of the judgement).

[b] The decision of the Supreme Court in J.K.Cotton Spinning & Weaving Mills Co. Ltd. v. State of Uttar Pradesh, reported in AIR 1961 SC 1170, was cited for the proposition that, in the interpretation of statutes, the Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the case of rule making authority also. (See paragraph 7 of the judgement).

[c] The decision of the Supreme Court in Mohammad Ali Khan v. Commissioner of Wealth Tax, reported in

AIR 1997 SC 1165, was cited for the proposition that, just as it is not permissible to add words or to fill in a gap or lacuna in statute, similarly it is of universal application that efforts should be made to give meaning to each and every word used by the legislature.

8.4 It was also argued that the Courts should adopt a purposeful construction so as to make the object of the legislation effective. In support of this argument, the learned Advocate General referred to the following decisions :

[a] The decision of the Supreme Court in Hindustan Lever Ltd. v. Ashok Vishnu Kante, reported in J.T. 1995(6) SC 625, was cited to point out that the Supreme Court in paragraph 41 of the judgement, approvingly referred to its earlier decision in Workmen of American Express International Banking Corporation v. Management of American Express International Banking Corporation, reported in 1985(4) SCC 71, wherein it was observed that the words occurring in statutes of liberal import such as social welfare legislation and human rights legislation were not to be put in Procrustean beds or shrunk to Liliputian Dimensions. The Supreme Court in paragraph 42 approvingly referred to a passage from the book, "Statutory Interpretation", 2nd Edition, by Francis Bemmion, in which, it was observed that a purposive construction of an enactment was one which gives effect to the legislative purpose by following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose or applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.

[b] The learned Advocate General also relied upon the following passage from "Principles of Statutory Interpretation" by Mr. Justice G.P.Singh, Eighth Edition, p.106-107 :-

"The rule which is also known as `purposive construction' or `mischief rule', enables consideration of four matters in construing an Act : (1) What was the law before the making of the Act, (ii) What was the mischief or defect for which the law did not provide, (iii) What is the remedy that the Act has provided, and (iv) What

is the reason of the remedy. The rule then directs that the courts must adopt that construction which "shall suppress the mischief and advance the remedy"."

8.5 It was then argued that there was no presumption that there was casus omissus in the statute and creases in the legislation should be iron out. In support of these contentions, the learned Advocate General relied upon the following decisions :

[a] The decision of the Supreme Court in Commissioner of Income-Tax, Central, Calcutta v. National Taj Traders, reported in AIR 1980 SC 485, was cited for the proposition that a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself, but at the same time, a casus omissus should not be readily inferred and for that purpose, all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute.

[b] The decision of the Supreme Court in Ahmedabad Municipal Corporation v. Nilaybhai R. Thakore, reported in AIR 2000 SC 114 was cited to point out that, in paragraph 14 of the judgement, the Supreme Court approvingly cited the oft-quoted principle that, when a defect appears, a judge cannot simply fold his hand and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give `force and life' to the intention of the Legislature. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases. It was held that this statement of law made by Lord Denning has been consistently followed by the Supreme Court.

8.6 It was then contended that the Amendment Order was prospective and from the date it came into force, it should be given full effect and all the decisions as regards the grant or renewal of licence were to be

rendered on the basis of the amendment after the date of the amendment. If, at the stage of renewal, the applicant was ineligible to get any licence, the application had to be rejected, because, right of renewal was not a vested right. In support of this contention, the learned Advocate General relied upon the following decisions :

[a] The decision of the Supreme Court in Bishun Narain Misra v. State of Uttar Pradesh, reported in AIR 1965 SC 1567, * was cited to point out that, in a case where rule provided that, from the date it came into force, the age of retirement would be 55 years, it was held that, such a rule would apply from that date to all government servants even though they may have been recruited before 25th May 1961 when the government again reduced the age of retirement to 55 year from 58 years, which was earlier raised to 58 years from 55 years, in the same way, as the rule of 1957 which increased the age from 55 years to 58 years applied to all government servants even though they were recruited before 1957. It was held that there was no retrospectivity of the rules. The contention that the proviso to the rule showed that it was applied retrospectively was rejected. Proviso laid down that the government servant who had attained the age of 55 years years on or before 17th June 1957 and had not attained the age of 58 years on May 25, 1961, would be deemed to have been retained in service after the date of superannuation, namely, 55 years. It was held that this proviso did not make the rule retrospective; it only provided as to how the period of service beyond 55 years should be treated in view of the earlier rule of 1957, which was being changed by the Rule of 1961.

[b] The decision of the Supreme court in Punjab University v. Subash Chander, reported in AIR 1984 SC 1415, was cited to show that, in paragraph 11 of the judgement, the decision in B.N.Misra (supra) was cited with approval.

[c] The decision of the Supreme Court in Dena Bank v. Bhikhabhai Prabhudas Parekh & Company, AIR 2000 SC 3654, was cited for the proposition that the legislation may be made to commence from a back date, i.e. from a date previous to the date of its enactment. To make a law governing a past

period on a subject is retrospectivity. A legislature is competent to enact such a law. The ordinary rule is that a legislative enactment comes into operation only on its enactment and retrospectivity is not to be inferred unless expressed or necessarily implied in the legislation, specially those dealing with substantive rights and obligations. It was pointed out that the Supreme Court approvingly cited a passage from the Principles of Statutory Interpretation by Justice G.P.Singh, Seventh Edition, 1999, page 369, in which, it was observed that rule against retrospective construction was not applicable to the statute merely, "because a part of the requisites for its action is drawn from a time antecedent to its passing".

[d] The decision of the Supreme Court in State of Tamil Nadu v. M/s Hind Stone, reported in AIR 1981 SC 711, was cited to point out that, it was held that Rule 8C of the Tamil Nadu Minor Mineral Concession Rules (1959) was attracted when applications for renewal of lease were dealt with. In paragraph 12, the Supreme Court observed : "If as a result of experience gained after watching the performance of private entrepreneurs in the mining of minor minerals, it is decided to stop grant of leases in the private sector in the interest of conservation of the particular mineral resource, attainment of the object sought will be frustrated if renewal is to be granted to private entrepreneurs without regard to the changed outlook. In fact, some of the applicants for renewal of leases may themselves be the persons who are responsible for the changed outlook. To renew leases in favour of such persons would make the making of Rule 8C a mere exercise in futility. It must be remembered that an application for the renewal of a lease is, in essence, an application for the grant of a lease for a fresh period. We are, therefore, of the view that Rule 8C is attracted in considering applications for renewal of leases also". In paragraph 13, the Supreme Court observed : "While it is true that such applications should be dealt with within a reasonable time, it cannot on that account be said that the right to have an application disposed of in a reasonable time clothes an applicant for a lease with a right to have the

application disposed of on the basis of the rules in force at the time of the making of the applications. No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of the application."

[e] The decision of the Supreme Court in V.Karnal Durai v. The District Collector, reported in J.T. 1998(8) SC 301 was cited to point out that the earlier decision of the Supreme Court in State of Tamil Nadu v. M/s Hind Store (supra) was approvingly referred to in paragraph 12 of the judgement.

[f] The decision of the Supreme Court in Darshan Singh v. Ram Pal Singh, reported in AIR 1991 SC 1654, was cited for the proposition that a statute was not retrospective merely because it affected existing rights, nor was it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. The Supreme Court in paragraph 36 of the judgement approvingly referred to a passage from Halsbury's Laws of England, 4th Edition, on the meaning of "retrospective". In the same decision, the Supreme Court also referred to the meaning of "retrospective law" from Black's Law Dictionary.

[g] The decision of the Supreme Court in Dilip v. Mohd. Azizul Haq, reported in AIR 2000 SC 1976, was cited to point out that, in context of the provisions of Clause 13-A of the C.P. & Berar Letting of Houses and Rent Control Order (1949), it was held by the Supreme Court that the said provision merely provided for a limitation to be imposed for the future which in no way affects anything done by a party in the past and statutes providing for new remedies for enforcement of an existing right will apply to future as well as past causes of action.

8.7 The learned Advocate General further contended

that if on enactment of the amendment, the definition of "PDS kerosene wholesale dealer" under clause 2(18A) makes a dealer ineligible, his wholesale dealer licence can be revoked. In support of this contention, he placed reliance on the decisions in the case of Dena Bank v. Bhikhabhai Prabhudas Parekh & Company (supra) and Bishun Narain Misra v. State of Uttar Pradesh (supra), and further referred to the following two decisions:

[a] The decision of the Supreme Court in Punjab University v. Subash Chander, reported in AIR 1984 SC 1415, was cited to point out that, where a candidate had joined M.B.B.S. course in the year 1965, but appeared for the final examination in the year 1974, when he was not eligible for grace marks for the subjects as a result of which he was declared fail, it was held that a declaration that the candidate failed by virtue of amended regulation as regards grace marks was not invalid, and there was no element of retrospectivity in the change brought by the amendment. It cannot be said to be retrospective in operation merely because though introduced in 1970, it was applied to the candidate who appeared for the final examination in the year 1974, after he had joined the course earlier in the year 1965. The Supreme Court held that no promise was made or could be deemed to have been made to him at the time of his admission in the year 1965 that there will be no alteration of the rule or regulation in regard to the percentage of marks required for passing any examination or award of grace marks.

[b] The decision of the Supreme Court in Mohinder Kumar v. State of Haryana, reported in AIR 1986 SC 244, to point out that the classification of buildings with reference to the date of commencement of the Haryana Urban (Control of Rent and Eviction) Act (11 of 1973), had a rational basis and had a clear nexus with the object to be achieved by the act of encouraging the construction of new buildings, and that, Section 6(1)(3) thereof could not be said to be bad on the ground that the provisions operated retrospectively and sought to take away the vested rights of the tenants under the Act. It was held that the question of acquiring any vested rights really did not arise. Even if it could be said that the tenants had acquired any

right because of any invalidity of the earlier provision before amendment, it was always open to the Legislature to remove any defect to make it valid.

9. In reply, the learned Senior Counsel for the appellants argued that the State Government, while exercising delegated powers under Section 5 read with Section 3(1) of the said Act, had no authority to legislate with retrospective effect unless the power was expressly conferred. It was submitted that there was no such power conferred on the State Government to make orders having retrospective effect and in absence of any such delegation, no retrospective effect could be attributed to the amended order, as was sought to be done by the impugned circular. As regards the argument that condition No.1 of the licence which referred to the provisions of the Licencing Order, 1981, should be deemed to include any amendments that may follow, it was contended that the said condition had reference to the provisions of the Licencing Order as they stood on the date on which the licence was issued and future amendments could not have been contemplated by that condition. Reliance was placed on the following decisions in support of this contention :

[a] The decision of the Supreme Court in Jethanand Betab v. The State of Delhi, reported in AIR 1960 SC 89, was cited to point out that, in paragraph 7 of the judgement, the Supreme Court had approvingly referred to Maxwell on interpretation of statute by re-producing a passage, in which it was stated that, "Where the provisions of one statute are, by reference, incorporated in another and the earlier statute is afterwards repealed the provisions so incorporated obviously continue in force so far as they form part of the second enactment."

[b] The decision of the Supreme Court in Ram Sarup v. Munshi and others, reported in AIR 1963 SC 553, was cited for the same proposition that, where the provisions of an Act are incorporated by reference in a later Act the repeal of the earlier Act has, in general, no effect upon the construction or effect of the Act in which its provisions have been incorporated.

9.1 It was also contended that the licence carried a vested right for five years under clause 5(1) of the Licencing Order, and it was not just an existing right to

apply for a renewal in abstract. It was submitted that none of the judgements cited on behalf of the respondents dealt with vested rights. It was argued that in cases where the government had filed appeals, licences were already issued and those petitioners had vested rights to carry on their business under the licence as wholesale kerosene dealers notwithstanding amendments made by insertion of clause 2(18A) in the Licencing Order. A decision of the Supreme Court in State of U.P. v. Daulat Ram Gupta, reported in AIR 2002 SC 1633, was cited to point out that the Supreme Court, in context of the provisions of the U.P. High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supply & Distribution) Order (1981), particularly clause (16) thereof, held that it was manifest from the provisions of the Statutory Order, in so far as conditions of grant of licence for sale of diesel oil are concerned, that the Statutory Order was a complete code in itself and there was no provision in it under which the Licencing Authority could refuse to renew a licence if licensee's place of business falls within a radius of 5 KMs of a government run retail outlet.

10. The Essential Commodities Act, 1955 was enacted in the interests of general public, for the control of the production, supply and distribution of and trade and commerce in commodities which were declared as essential under the Act. To achieve these objectives, the government has been vested with powers under the Act, to issue orders for regulating the production, storage, transport and distribution of such essential commodities and for controlling the prices etc. Section 5 of the said Act enables the Central Government to delegate the powers to make Orders or issue notifications under Section 3 of the Act to State Government and to other officers or authorities mentioned in that section. The Orders made under Section 3 shall have an overriding effect, under Section 6, over anything inconsistent in any enactment other than the Essential Commodities Act.

11. Under clause (d) of Section 3(2) of the Act, an Order made under sub-section (1) of Section 3 may provide for regulating by licence, permit or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity. "Petroleum and petroleum products" are at item (viii) of the classes of commodities defined as "essential commodity" under clause (a) of Section 2 of the said Act.

12. The Government of Gujarat, being of the opinion that it was necessary and expedient, so to do for maintaining supplies of certain essential commodities and

for securing their equitable distribution and availability at fair prices, made the Gujarat Essential Articles (Licencing, Control & Stock Declaration) Order, 1981, in exercise of its powers under Section 3 of the said Act, read with the Order of the Government of India dated 30th November 1974, and other relevant Orders mentioned in the preamble to the said Licencing Order of 1981, by which the powers were delegated to it.

12.1 The word "dealer" is widely defined in clause 2(5) so as to mean, a person, a firm, an association of persons, a company, a corporation or a cooperative society engaged in the business of purchase, sale or storage for sale of any essential article, whether or not in conjunction with any other business and includes his representative, agent or, as the case may be, commission agent. The expression, however, does not include, inter alia, an oil company dealing in petroleum products.

The expression "essential article" is defined in clause 2(8) so as to mean any an article specified in Schedule I. This is an important definition which will demarcate the area of operation of the Licencing Order.

The word "retailer" has been defined in clause 2(18) as follows :

> "2(18). `Retailer' means a dealer who sells essential articles to consumers and holds a retailer's or hawker's licence issued under this Order."

The word "wholesaler" is defined in clause 2(25) as under :

> "2(25). `Wholesaler' means a dealer who sells essential articles to retailers, other dealers or bulk consumers and holds a wholesaler's licence issued under this Order."

The expression "PDS Kerosene wholesale dealer" as defined by the newly inserted clause 2(18A) by the impugned Amendment Order, reads as follows :

> "2(18A). `PDS Kerosene wholesale dealer' means a dealer appointed by any of the oil companies engaged in marketing of PDS Kerosene, as per the authorization from the Government of India".

12.2 As per the Scheme of the said Licencing Order,

clause 3(1) provides for licencing of Dealers and Producers, and it lays down that, on and after the 20th day of April 1981, no person shall carry on business as a dealer, inter alia, in petroleum products, except under and in accordance with the terms and conditions of a licence granted under this Order. Clause 4 contains provisions for issuance of licence and lays down that every application for issue or re-issue of a licence or renewal thereof shall be made to the licensing authority in Form `A'. Every licence shall be issued, re-issued or renewed in Form `B'. It is provided that every licence issued under this Order shall be non-transferrable. It will be seen that neither Clause 3 nor Clause 4 by themselves refer to any category of licences. However, the statutory Form `A' in which an application is required to be made and which must be read as a part of the Licencing Order, contains particulars including the categories of licence required and even Form `B' which also is a part of the Licencing Order, refers to the capacity in which the licence is issued to the applicant. Clause 5 of the Licencing Order, 1981 prescribes period of validity of a licence to be five years from 1st January of the year in which it was issued, and also lays down that such licence may be renewed for a period of five years. Sub-clause (2) of Clause 5 provides that, when an application for renewal of a licence is made either within the period of validity of the licence under sub-clause (1) or before the end of February under the second proviso to sub-clause (1), the licence holder shall be deemed to be duly licenced till the date on which the licensing authority either renews or refuses to renew the licence.

12.3 Clause 7 of the Licencing Order deals with powers to refuse licence, which may be exercised by the licencing authority after giving an opportunity of being heard to the applicant, and for the reasons to be recorded in writing. The order refusing to grant or renew the licence is appealable under the provisions of clause 11. Sub-clause (2) of clause 7 enumerates cases where the licencing authority shall refuse to grant or renew the licence and these are of a minor or a lunatic or a person of unsound mind and an undischarged insolvent or cases where three years' period has not expired from the date of conviction of the applicant under the Act.

12.4 Clause (8) deals with suspension or cancellation of licence for contravention of the Licensing Order or conditions of licence, and Clause (9) relates to cancellation of licence on contravention of any Order made under Section 3 of the Act. Clause 17 relates to

submission of returns and in a circular which was issued on 21-1-1999 under sub-clause (2) of clause 17, a dealer in an essential article included in the public distribution system including kerosene was required to furnish a monthly return so as to reach the licencing authority on or before 10th day of next following month.

13. The contention of the appellants is that the added definition of "PDS Kerosene wholesale dealer" in the Licencing Order of 1981 makes no sense without any corresponding change being made in the substantive provisions of the said Order under which the appellants were entitled to get wholesale dealers licence. The definition of "PDS kerosene wholesale dealer" even as added in the order cannot by itself affect any rights, obligations and powers dealt with by the provisions of the Order.

13.1 The Licencing Order, 1981 was enacted by the State Government in exercise of the powers conferred by Section 3 of the Essential Commodities Act read with the delegation order dated 30-11-1974, making it obligatory for the dealers to get a licence under the Order for carrying on business in essential articles specified under clause 3(1)(a) or in petroleum products under clause 3(1)(b). `Petroleum products' are essential commodities under clause (viii) of Section 2 of the Essential Commodities Act; and `essential articles' for the purpose of the Licencing Order, 1981 are those which are specified in its Schedule I which earlier included in Part II the following entry :

"SCHEDULE I
(See Clause 2(8))

Part I - xxxxx

Part II
(Other than food stuff)

(1) xxxxx

(2) Petroleum products namely (a) kerosene, (b) light diesel oil, (c) high speed diesel oil or any other petroleum products which the State Government may by notification in the official gazette specify for the purpose of this Order."

13.2 By amendment made by Amendment Order dated 22-2-1994, the aforesaid item (2a) was substituted as under :

"Part II

Other than Food stuff

(1) xxxxx

(2) Petroleum products namely :

(a) + Kerosene other than the kerosene sold under parallel Marketing System as defined in the order of the Government of India, Ministry of Petroleum and Natural Gas No. G.S.R. 584(E) dated the 2nd September 1993.

(b) xxxxx "

13.3 Therefore, anyone wanting to carry on business as a dealer, whether as "retailer" or "wholesaler" in any essential article including kerosene which is a petroleum product was required to obtain a licence under clause 4 of the Licencing Order, 1981.

13.4 An application for issue or re-issue or renewal of licence has to be made in the statutorily prescribed Form `A'. This Form clearly indicates from item (4) that there are five categories of licences, namely,

(i) Retailer's licence
(ii) Hawker's licence
(iii) Wholesaler's licence
(iv) Commission agent's licence
(v) Producer's licence

13.4 The kind of essential articles for which the licence is sought are required to be mentioned in the application Form `A'. The applicant is required to specifically state the category of licence required by him and strike out the categories which are not applicable. He has also to mention whether he desires to carry on business as commission agent or wholesaler or retailer or hawker or producer, against clause 19 of Form `A' or whether he is already a commission agent, distributor, wholesaler, retailer, hawker, producer or any other kind of dealer, against clause 10 of the Application Form. Even in Form `B' prescribed under clause 4(2) of the Licencing Order in which licence is to be issued by the licencing authority, it is to be specifically mentioned that the licence was issued for business in the capacity of retailer or hawker or wholesaler or commission agent or producer, as the case

may be, and the description not applicable was required to be struck out. It was also to be mentioned that the licence was for purchase / sale / storage for sale of essential articles named therein.

13.6 Thus, when a `dealer' within the meaning of clause 2(5) engaged in the business of purchase, sale or storage of any essential article applied for a licence, he was required to specify the essential article and the category for which he was making the application for licence. As noted above, by amendment in Schedule I Part II of the Licencing Order, 1981 made by Amendment Order dated 22-2-1994 (bearing No. GTH/23/KSN/1093/3015/B), the earlier general entry 2(a) of `kerosene' was substituted and after the said date, Part II of Schedule I it included only "kerosene other than the kerosene sold under parallel marketing system as defined in the Order of the Government of India, Ministry of Petroleum and Natural Gas No. GSR:584(E) dated the 2nd September 1993", as the essential article within the meaning of clause 2(8) for which a licence was required to be obtained by anyone desiring to do business as `retailer' or `wholesaler' etc. in such kerosene.

13.7 By virtue of the aforesaid amendment made on 22-2-1994 in the Licencing Order, 1981, kerosene other than the kerosene sold under the parallel marketing system, as defined in the Kerosene Order dated 2nd September 1993, which means only the public distribution system kerosene (PDS Kerosene), was specified as an essential article under clause 2(8), for which a licence was required under clause 3. Therefore, in an application for licence in Form `A', if made for public distribution system kerosene, essential article was required to be mentioned, as also the category for which the licence was applied for, namely, whether as a `retailer' or `wholesaler' etc. The applicant was required to state against item 19 of the Form `A' whether he desired to do business as `retailer' or `wholesaler' etc. in such essential article. In cases where the application was made for a wholesaler's licence for PDS kerosene, the definition in clause 2(18A) of the amended Licencing Order, 1981 would necessarily be attracted for the purpose of deciding whether such licence could be issued under clause 4, because, the application was required to be made in the prescribed Form `A' for getting a licence as wholesale dealer in public distribution system kerosene, which was an essential article included in Part II item 2(a) of the Schedule I contained in the Licencing Order, 1981. The Amendment Order of 2002 introducing the definition of `Public

distribution system kerosene wholesale dealer' under clause 2(18A) cannot, therefore, be said to be an abortive exercise, nor can it be said that the said definition was inapplicable in the context of the provisions relating to issuance of wholesaler's licence in PDS kerosene.

14. Public Distribution System is a deliberate social policy adopted in India in the process of its planned economic development and an important component of the policy of growth with justice. The public distribution system is aimed at providing foodgrains and other essential articles, including kerosene, to vulnerable sections of the society at subsidized prices, and to ensure equitable distribution of essential commodities. Kerosene oil is used both as a lighting material and cooking medium by poor households. The supply to the State Governments, on the basis of allocations made by the Central Government, is arranged by the public sector Oil Companies either from domestic production or by imports and it is sold at subsidized prices.

14.1 The Central Government, in exercise of its powers under Section 3(1) of the Essential Commodities Act, 1955, made Public Distribution System (Control) Order, 2001 on 31st August 2001, after forming an opinion that it was necessary and expedient so to do for maintaining supplies and securing availability and distribution of essential commodities under the public distribution system. The provisions of the said Public Distribution System (Control) Order show that it is directed to make available the essential commodities to poor sections of the community. Under Clause 2(j) a `fair price shop' means a shop, which has been licenced to distribute essential commodities by an order issued under Section 3 of the Essential Commodities Act, to the ration card holders under the Public Distribution System. The words `Public Distribution System' as defined by clause 2(l) mean, the system for distribution of essential commodities to the ration card holders through the fair price shops, such as, rice, wheat, sugar, edible oils, kerosene and such other commodities as are notified by the Central Government under clause (a) of section 2 of the Act. Clause 3 provides for identification of families living below the poverty line, which function is to be performed by the State Government, as per the guidelines indicated in paragraph 1 of the Annexure to this Order. The State Government under clause 4 is required to issue distinctive ration cards to "Above Poverty Line", "Below Poverty Line" and "Antyodaya" families, and is required to conduct periodic review and

checking of ration cards as indicated in paragraph 2 of the Annexure to the said Order. Under clause 5, the Central Government is required to make available to the State Governments foodgrains for distribution under the Public Distribution System at such scales and prices as provided in paragraph 3 of the Annexure to the said Order. Under clause 6(2), it is the duty of the fair price shop owners to take delivery of stocks from authorized nominees of the State Governments to ensure that essential commodities are available at the fair price shop within first week of the month for which the allotment is made. Clause 7 makes a licensing provision for the fair price shops and the procedure for issue of licences or authorization to the fair price shops for the distribution of essential commodities under Public Distribution System and duties and responsibilities of the fair price shop owners shall be as per paragraph 5 of the Annexure to the said Order. Under clause 5 of the Annexure to the Order, the State Governments are required to issue an Order under Section 3 of the Act for regulating the sale and distribution of the essential commodities.

14.2 Having regard to the nature of the public distribution system in the essential articles including kerosene, it is clear that the purpose underlying the public distribution system will be frustrated if the essential articles meant to reach the ration card holders, who are economically poor persons, at subsidized rates, get diverted to open market for being sold at higher rates, resulting in illicit profits to the dealers who so divert the essential commodity in violation of the Public Distribution System policy and the provisions of the Public Distribution System (Control) Order 2001 as well as the Essential Commodities Act. Therefore, any effort to ensure that the scope of such diversion is minimized would be a reasonable step in the direction of achieving the objects of Public Distribution System.

15. The Public Distribution System, which in the context of kerosene, finds a specific reference in the "Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993 issued by the Central Government in exercise of its powers under Section 3 of the Essential Commodities Act, 1955, is thus a well-known concept. The amendment in Part II of Schedule I of the Licencing Order, 1981 by the Amendment Order dated 22-2-1994, by which "kerosene other than the kerosene sold under the parallel marketing system as defined in the Order of the Government of India, Ministry of Petroleum & Natural Gas, No.G.S.R. 584(E), dated 2nd September 1993" was

substituted for "kerosene" is to be understood in light of the provisions of the said Kerosene Order of 1993 as well as the Public Distribution System (Control) Order of 2001 issued by the Central Government.

15.1 Clause 2(c) of the Kerosene Order, 1993 defines `dealer' so as to mean a person, firm, association of persons, company, institution, organization or a co-operative society approved by Government Oil Company or Central or State Government or a parallel marketer and engaged in the business of buying and selling kerosene. The Government Oil Companies are enumerated in clause 2(f) of the said Order. Under sub-clause (h) of clause (2), `parallel marketer' is defined so as to mean any person, firm, company, institution, association of persons, co-operative society or organization carrying on the business of importing, storing, refining, producing, packing, marketing, distributing and selling kerosene under the parallel marketing system. The words `parallel marketing system' are defined in clause 2(i) to mean, the system other than the public distribution system, under which a person imports, stores, transports, packs, distributes or sells kerosene under his own arrangement. The expression `public distributions system' as defined in clause 2(j) of the Kerosene Order, 1993, means the system of distribution, marketing or selling of kerosene at declared price through distribution system approved by the Central or State Government.

15.2 Clause 3B of the said Kerosene Order provides for restriction on Sale and Use of Kerosene Imported under `Parallel Marketing System' by persons not authorized, and lays down that, "No person other than the dealer or Government Oil Company or Parallel Marketer shall sell kerosene to any person". It will, thus, be seen that there is a restriction on a dealer appointed under the public distribution system to sell, distribute or supply kerosene under the system to any person other than for whom the supplies are meant. Thus, the dealers appointed under the public distribution system would be obliged to supply kerosene under the public distribution system to the fair price shops which are governed by the Public Distribution System (Control) Order, 2001.

15.3 Clause 4 of the Kerosene Order of 1993 deals with procurement, storage and sale of kerosene under the public distribution system. Clause 6 provides for maintenance of registers, account books and submission of returns by a dealer under the public distribution system. It is clear from clauses 4, 5 and 6 of the Kerosene Order that the dealers under the Public Distribution System are

required to work under the stringent conditions prescribed under the said Order, and all this is obviously aimed at ensuring that the public distribution system functions efficiently so far as the essential article of kerosene is concerned. Separate provisions are made in clause 7 for maintenance of records and furnishing of information by `parallel marketers'. By clause 8 of the said Order, it is provided that kerosene under public distribution system should be made distinguishable from the kerosene to be imported, sold or distributed under parallel marketing system by use of suitable measures to be adopted by the Government Oil Companies, as and when necessary. This explains the distinguishing feature of the PDS Kerosene, namely, its blue colour.

15.4 Since `public distribution system' means the system of distribution, marketing or selling of kerosene at a declared subsidized price through distribution system approved by the government, it would be lawful for the State Government to determine a medium through which the distribution of kerosene should be made. In view of the definition of `parallel marketing system' and `public distribution system' in clauses 2(i) and 2(j) of the Kerosene Order, 1993, it becomes clear that the entry of essential article `kerosene other than the kerosene sold under parallel marketing system as defined in the Order of the Government of India ....., dated the 2nd September 1993" appearing in Schedule I Part II, at item 2(a) of the Licencing Order, 1981 would mean kerosene sold under the Public Distribution System i.e. `PDS Kerosene'.

15.5 It will be noticed from the provisions of the Kerosene Order, 1993 that the restrictions on dealers appointed under the public distribution system are made more stringent in order to achieve the objects of the public distribution system. No person other than the dealer or government oil company or parallel marketer can sell kerosene to any person and no dealer appointed under the public distribution system can sell, distribute or supply `PDS kerosene' to any person other than for whom the supplies are meant. Such dealer has to be a person approved by the government oil companies or Central or State Government or a Parallel Marketer and engaged in the business of buying and selling kerosene as per the definition of `dealer'. All that the State Government has done by adding the definition under clause 2(18A) of the Licencing Order, 1981, read with the relevant essential article i.e. kerosene under the public distribution system, is to confine the wholesale

dealership in `PDS kerosene' only to one category of dealers i.e. those who are approved by the government oil companies, as envisaged by clause 2(c) of the Kerosene Order of 1993, for the purpose of licence under the Licencing Order, 1981 to sell `PDS kerosene' as wholesale dealers. This has been done with a view to eliminate other wholesalers who were themselves required to buy `PDS kerosene' from the dealers appointed by the government oil companies and then supply it to the fair price shops established under the Public Distribution System (Control) Order. Instead, the dealers appointed by the government oil companies would now directly supply the `PDS kerosene' to the fair price shops under the Public Distribution System. Such a course was open to be adopted by the State Government in regulating the distribution of kerosene to fair price shops, because, there appeared to be no need for middlemen between the dealers of the government oil company and the fair price shops. Moreover, removal of middlemen would eliminate one cause of illicit diversion of kerosene meant for the PDS fair price shops and ration card holders, to the open market. Such a course even if it adversely affected the right to carry on business, was a reasonable restriction in the interests of general public, as contemplated by the provisions of Article 19(6) of the Constitution. Having regard to the underlying purpose of the restriction imposed, namely, to provide a speedy and more convenient distribution of kerosene through the public distribution system and the evil sought to be remedied by removing the unnecessary chain of middlemen from the public distribution system for distribution of kerosene to ration card holders, the restriction imposed by the amended Licencing Order of 1981, is a reasonable restriction imposed in the interests of general public on the exercise of rights guaranteed by Article 19(1)(g) of the Constitution. The restriction is clearly aimed at promoting the welfare of the people who are economically weak and is in consonance with the directive principles of State policy enjoining a duty on the State to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. The restriction can, therefore, by no means, be termed as excessive or disproportionate, as alleged. The challenge against the Amendment Order, 2002 on the ground that it violates the fundamental rights of the appellants guaranteed by Article 19(1)(g) of the Constitution, therefore, fails.

16. The Kerosene Order of 1993 itself recognizes separate classes of dealers and provided different

treatment to those who dealt with kerosene under the parallel marketing system and the dealers who were appointed under the public distribution system. The public distribution system was kept under the total control of the government. The classification of dealers into those who were appointed under the public distribution system and those who were in the parallel marketing system was a valid and rational distinction between the two categories devised under the Kerosene Order of 1993 so as to provide more stringent control over the dealers appointed under the public distribution system.

16.1 The dealers appointed by the government oil companies are selected on the basis of the comprehensive guidelines for Dealer Selection issued by the Government of India, Ministry of Petroleum & Natural Gas. The selection of kerosene dealers is to be made by a Dealer Selection Board headed by a retired Judge of a High Court or retired District Judge as Chairman nominated by the government and with members nominated by the oil industry. There exist guidelines for the Dealer Selection Board to judge the inter-se suitability of the candidates and to evaluate them. The dealers in kerosene appointed by the government oil companies are, therefore, under a comprehensive control, as regards the kerosene meant for distribution under the public distribution system, which had necessarily to come through them. Therefore, the distribution of `PDS kerosene' to the fair price shops governed by the Public Distribution System (Control) Order, 2001 can be directly done by such dealers of the government oil companies through whom the oil companies marketed their commodity. The dealers in kerosene who are appointed by the government oil companies, by virtue of their association with the oil companies, form a distinct class. Confining the issuance of PDS kerosene wholesale dealer's licence to such dealers of the oil companies has a rational relation to the object sought to be achieved by the amendment in the Licencing Order of 1981, because, the supply of kerosene meant for PDS fair price shops for the ration card holders can be smoothly and efficiently effected by a direct distribution through the dealers of the government oil companies to retailer fair price shops rather than through the middlemen who were bound to purchase the PDS kerosene from the dealers of the government oil companies. Therefore, no equals are treated unequally since the classification is based on a rational criteria. The classification has a rational nexus with the object sought to be achieved by the law which is of effecting proper supply and distribution of `PDS kerosene' to the

poor masses through the PDS fair price shops. The challenge against the impugned Amendment Order, 2002 on the ground that it is violative of fundamental rights to equality guaranteed by Article 14 of the Constitution, therefore, fails.

17. The case of those whose licences were in fact renewed for five years and the case of those whose applications were pending, cannot be treated in the same category because of the intervention of the amendment in the Licencing Order that materially changed the effect of the substantive provisions of issuance of licence for kerosene. The decision of the learned Single Judge in Special Civil Application No.3492 of 2002 directing the authorities to consider issuance of licence for five years to those petitioners, as stipulated in clause 5(1) of the Licencing Order, as against three to six months for which licence was granted, did not create any right in rem in all those whose applications were pending for renewal and no renewal can be sought against the provisions of the amended Licencing Order, 1981. That decision of the learned Single Judge was not challenged, as stated by the learned Advocate General, and it's correctness is not in issue before us. It cannot, however, have the effect of precluding this Court from considering the impact of the provisions of the Amendment Order, 2002. The appellants cannot claim breach of right to equality on the ground that the cases of those whose applications were pending before the amendment and others, who were granted licences under the provisions of the Order, stood on the same footing.

18. The Amendment Order, 2002 is in consonance with the policy of distributing kerosene through public distribution system, as contemplated by the Public Distribution System (Control) Order of 31-8-2001 and the Kerosene Order, 1993, both issued by the Central Government. The Amendment Order, 2002 has been issued in exercise of powers under Section 3(1) of the Act read with the delegation order with the prior approval of the Central Government and is clearly warranted by the provisions of Section 3(1) of the Essential Commodities Act. There is no valid ground for holding that the Amendment Order, 2002 is ultra vires Section 3(1) of the said Act and therefore, the contention raised on that count on behalf of the appellants cannot be accepted.

19. The contention of the appellants that they had a vested right to get the renewal of the licence on the basis of clause 5(1) of the Licencing Order, 1981 and the terms of the licence, which contemplated renewal, is

based on the ground that they had made applications for renewal before the expiry of their licence on 31-12-2001.

19.1 Clause 5(1) of the Licencing Order, 1981 deals with duration of the licence and the period for which it may be renewed. There is no obligation on the licencing authority to renew the licence and renewal may be refused as much as grant of a licence itself, as is clear from the provisions of clause 7(1), which empowered the licencing authority to refuse to grant or renew a licence after giving the applicant an opportunity of stating his case and for the reasons to be recorded in writing. The licence in Form `B' is issued subject to the provisions of the Licencing Order, 1981 and therefore, when an application is made for renewal, the decision to grant licence cannot be taken in violation of the provisions of the Licencing Order, 1981. Under clause 5 of the licence, there is a condition that the licence holder cannot contravene the provisions of the Licencing Order, 1981 or any other Orders relating to essential articles issued under the provisions of the said Act. An application for renewal does not create any right to get the licence renewed, because, there is no automatic renewal contemplated by clause 5(1) of the Licencing Order, 1981. If the contention of the appellants that they have a right to get the licence renewed for five years, because, the licence holders have made the applications for renewal within the period of the validity of their licence is accepted, then notwithstanding any change in the Licencing Order, 1981, having effect of making the applicant ineligible, a licence holder can manage to continue, on the basis of renewals from time to time, perpetually.

19.2 Even the sub-clause (2) of clause 5 indicates that there is no right to renewal, because, when application for renewal is validly made, the licence holder shall be deemed to be duly licenced till the date on which the licencing authority either renews or refuses to renew the licence as provided therein. Therefore, there was no vested right to get the renewal of the licence under the provisions of the Licencing Order, 1981. The application for renewal, like any application for grant of a licence, was required to be considered in light of the provisions of the Licencing Order, 1981, as they existed at the time of taking a decision on such application.

19.3 There is a distinction between accrual of vested right and a privilege or expectation to get a right. The expectation or privilege to get a renewal of licence

under clause 5(1) of the Licencing Order, was not a right acquired or accrued to hold a renewed licence. Mere pendency of the application for renewal did not create any accrued or vested right to get the renewal. Therefore, the renewal applications, which were pending, were required to be dealt with according to the law in force on the date of the disposal of such applications.

19.4 As held by the Supreme Court in State of Tamil Nadu v. Hind Stone (supra), an application for the renewal of a lease is, in essence an application for the grant of a lease for a fresh period. While applications should be dealt with within a reasonable time, that does not clothe an applicant for a lease with a right to have the application disposed of on the basis of the rules in force at the time of the making of the application. It was held that, in the absence of any vested right in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there was a long delay since the making of the application. In Gajraj Singh v. STAT, reported in (1997)1 SCC 650, it was held that grant of renewal is a mere privilege and not an accrued or a vested right. In P.T.R. Exports (Madras) (P) Ltd. v. Union of India, reported in (1996)5 SCC 268, the Supreme Court held that the applicant for licence has no vested or accrued right to grant of licence in accordance with the policy obtaining at the time of submitting the application, and that the court would not bind the Government to its previous policy by invoking the doctrine of legitimate expectation of the applicant for licence.

19.5 The Amendment Order, 2002, therefore, did not take away any vested right of the appellants whose applications for getting the renewal of licence were pending on the date of the amendment. The challenge against the Amendment Order, 2002 on the ground that it has a retrospective effect or that it takes away the rights of the appellants to renewal of licence, fails, because, there was no vested right of renewal in the appellants under the Licencing Order, 1981 which could be said to have been adversely affected by the Amendment Order, 2002.

20. That takes us to the consideration of the validity of the instructions issued in the impugned circular that steps should be taken to cancel the licences which were already issued before the Amendment Order came into force. The Amendment Order, 2002 does not purport to have any retrospective effect, but it was

argued that it has a retroactive effect of making the licence holders who were not appointed by the Government oil companies ineligible to continue as wholesale dealers in `PDS kerosene' and therefore, their licences can be cancelled by giving them show cause notice and making a cancellation order.

20.1 When a licence is granted for a period of five years as specified by clause 5(1), the licence holder becomes entitled to do his business under the licence during that period. Such a right was not merely a procedural right, but a substantive right. In fact, a licence of this nature only regulates an already existing fundamental right to do business, subject to the reasonable restrictions imposed as per Article 19(6) of the Constitution. The licencing provisions eclipse the exercise of the fundamental right to do business and only those who are licenced would acquire a right under such licence to do their business in the field regulated validly by the licencing provisions. Without a licence, there was no right to do business in the field of purchase, sale or storage of essential commodities when Licencing Orders are issued under Section 3(1) of the Act. The said provision of Section 3(1) of the Act was immune to any challenge on the ground that it was inconsistent with the rights conferred by Part III of the Constitution in view of the Act being included in the Ninth Schedule. However, once a valid licence is granted, the right to do business in the field covered by the Licencing Order is acquired and can be exercised during the currency of the licence. Thus, the wholesale dealers in kerosene acquired a right to do business in kerosene, as per the terms and conditions of their operative licences. There was no statutory cancellation or revocation made of these licences. The subordinate legislation in form of Amendment Order 2002 did not even purport to cancel the existing licences.

20.2 A statute which affects the substantive rights is presumed to be prospective unless made retrospective either expressly or by necessary implication. To say that, by the impugned circular, `retroactive' effect was given to the amended provision in view of the licenced dealers having now become ineligible due to their not being the appointees of the Government oil companies is to bring a result which is neither intended nor warranted by the Amendment Order, 2002. Reading the new definition under Clause 2(18A) in the context of the provisions having bearing on the aspect of cancellation of licences, it does not create any new ground for cancellation of the licence on the basis of ex-post facto ineligibility

brought about by the Amendment Order 2002. To camouflage the attempt under the word `retroactive' will be to recognize retrospective effect of taking away the right accrued to the licence holders to do their business as per the conditions of licence during the period of its life of five years. No retroactive effect of taking away the acquired or accrued right can be attributed by an executive direction contained in the impugned circular, to the enactment which does not either expressly or impliedly impair such right acquired under the licence. When the enactment is alleged to impair an accrued or vested right, there would not be any distinction while considering it is intended to do so either expressly or by necessary implication by such enactment, on the ground that it is retrospective or retroactive, because, when vested right is impaired, the meaning and effect of these terms will be the same.

20.3 In this context, we may refer to the dictionary meanings of "retrospective" and "retroactive" from Merriam-Webster's Dictionary of Law, which are re-produced hereunder :

"Retrospective :- affecting things past, :

retroactive

specific

: of, relating to, or being a law that takes away or impairs vested rights, creates new duties or obligations, or attaches new disabilities with respect to acts and transactions completed before its enactment."

"Retroactive : extending in scope or effect to a prior time or to conditions that existed or originated in the past

esp.

: made effective as of a date prior to enactment, promulgation, or imposition

Example : a retroactive tax
(see also ex post facto law)"

20.4 In New Oxford Dictionary, these terms are defined as under :

"Retrospective :- (of a statute or a legal

decision) - Taking effect from the date in the past"

"Retroactive :- (especially of legislation) Taking effect from the date in the past."

21.3 In Black's Dictionary, "retrospective law" and "retroactive law" are defined as under :

"Retrospective law : A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred."

"Retroactive law : `Retroactive' or `retrospective' laws are generally defined from a legal viewpoint as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past."

20.6 Therefore, it has to be ascertained from the enactment under scrutiny, whether it is calculated to have a retrospective or retroactive effect of interfering with the accrued or vested rights. It has to be ascertained from the enactment itself whether it contains express provisions or provisions which, by necessary implication, have the effect of retrospective or retroactive operation of taking away or impairing vested rights. No such retrospective or retroactive operation can be attributed to the Amendment Order of 2002 in absence of there being any provision indicating such an effect.

20.7 Moreover, subordinate legislation cannot have retrospective effect unless the rule-making power in the statute concerned expressly or by necessary implication confers such power. The person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect. (See I.T.O. v. M.C.Ponnoose,

[(1969)2 SCC 351, Hukum Chand v. Union of India [(1972)2 SCC 601, State of M.P. v. Tikamdas [(1975)2 SCC 100, Regional Transport Officer v. Associated Transport Madras (P) Ltd. [(1980)4 SCC 597], Union of India v. Tushar Ranjan Mohanty [(1994)5 SCC 450] and Bejgam Veeranna Venkata Narasimloo v. State of A.P. [(1998)1 SCC 563].

20.8 Therefore, the impugned circular, to the extent it directs cancellation of the existing licences, issued under the Licencing Order, 1981 before the expiry of their duration, is ultra vires the provisions of the Licencing Order, 1981 and has been rightly held to be illegal and inoperative by the learned Single Judge.

21. In view of the above discussion, we are unable to accept any of the contentions raised in the respective two groups of appeals, and find ourselves in agreement with the decision rendered by the learned Single Judge. All the appeals are, therefore, dismissed with no order as to costs. All the Civil Applications also accordingly stand dismissed with no order as to costs.

[R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

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